(1) preme Court, U.S.
FILED

00-200 AUG - 2 2000

No. 00- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALBERT E. FOWERBAUGH, JR.
Counsel of Record
MICHAEL R. HASSAN
R.R. MCMAHAN
LORD, BISSELL & BROOK
Attorneys for Petitioner
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

161230

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

8920

QUESTION PRESENTED

May the State of New York, consistent with the Due Process Clause of the Fourteenth Amendment, require foreign unlicensed reinsurers to post a bond before they may defend suits brought against them in New York that have not been subjected to even a preliminary judicial assessment of their merits?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Seguros La Republica, S.A., is an insurance company organized under the laws of Mexico, and located in Mexico City, D.F. Its parent corporation is Grupo Financiero Interacciones, S.A. de C.V., whose stock is publicly traded on the Mexican stock exchange.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement Pursuant To Rule 29.6	ii
Table Of Contents	iii
Table Of Cited Authorities	v
Table Of Appendices	xii
Opinions Below	1
Statement Of Jurisdiction	1
Constitutional And Statutory Provisions Involved	2
Statement Of The Case	2
Reasons For Granting The Writ	5
I. The Second Circuit's Ruling That Section 1213 Authorizes A Constitutional Pre-Judgment Attachment Contradicts This Court's Ruling In *Doehr v. Connecticut*	5
A. Section 1213 Impaired La Republica's Property Interest In $5,7000,000 Of Its Assets	6

Contents

Page

B. Imposing a $5,700,000 Pre-Answer Bond Without First Making A Preliminary Determination Of The Merits Of The Plaintiff's Claims Is Contrary To The Rulings Of This Court In *Doehr, Fuentes* And *Sniadach* And Creates A Substantial And Unconstitutional Risk Of The Erroneous Deprivation Of La Republica's Property 8

C. Neither The Plaintiff Nor The State of New York Has Any Significant Interests Justifying Imposing a Pre-Answer Bond Upon La Republica 12

II. The Question Presented Is Important Because It Has A Profound Effect On The Global Reinsurance Market 17

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

American Centennial Ins. Co. v. Seguros La Republica, 1996 WL 304436 (S.D.N.Y. 1996) .. 3

Connecticut v. Doehr, 501 U.S. 1 (1991) 4

Curiale v. Ardra Insurance Co., Ltd., 88 N.Y.2d 268 (1996) 13, 15

Degen v. United States 517 U.S. 820 (1997) 17

Doehr v. Connecticut, 501 U.S. 1 (1991) ..... *passim*

Fuentes v. Shevin, 407 U.S. 67 (1972) 8, 9, 10

Green v. United States, 356 U.S. 165 (1958) 17

Hovey v. Elliott, 167 U.S. 409 (1897) 16, 17

Lakehead Pipe Line Co., Inc. v. American Home Assur. Co., 981 F. Supp. 1205 (D. Minn. 1997) 20

Mid-American Indemn. Ins. Co. v. King, 1995 WL 407388 (S. Ct. Tex. 1995) 20

Ortega-Rodriguez v. United States, 507 U.S. 234 (1993) 17

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) 8, 9, 10

Cited Authorities

Page

Stephens v. National Distillers and Chem. Corp., 69 F.3d 1226 (2d Cir. 1995) 6

Trihedron Int'l Assur. Ltd. v. Superior Court, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (1990) ... 20

Statutes:

Alabama (Ala. Code § 27-10-53) 18

Alaska (Alaska Stat. § 21.33.031) 18

Arizona (Ariz. Rev. Stat. §§ 20-401.01(B)(2), 20-405) 19

Arkansas (Ark. Code. Ann. §§ 23-65-204, 23-65-205) 19

California (Cal. Ins. Code § 1616) 18

Colorado (Col. Rev. Stat. § 10-3-1004) 18

Connecticut (Conn. Gen. Stat. § 38a-27) 18

Delaware (Del. Code Ann. tit. 18, §§ 2106-2107) . 19

Florida (Fla. Stat. Ann. §§ 626.908, 626.912) 19

Georgia (Ga. Code Ann. §§ 33-5-57, 33-5-59) 19

Cited Authorities

	Page
Guam (22 Guam Code Ann. §§ 15204, 15207)	19
Hawaii (Haw. Rev. Stat. § 431:8-208)	18
Idaho (Idaho Code §§ 41-1208, 41-1210)	19
Illinois (215 ILCS 5/123)	18
Indiana (Ind. Code §§ 27-4-4-4, 27-4-4-6)	19
Iowa (Iowa Code §§ 507A.4, 507A.7)	19
Kansas (Kan. Stat. Ann. § 40-2003)	18
Kentucky (Ky. Rev. Stat. Ann. § 304.11-040)	18
Louisiana (La. Rev. Stat. Ann. § 22:1255)	18
Maine (Me. Rev. Stat. Ann. tit. 24-A, §§ 2106, 2107)	19
Massachusetts (Mass. Gen. Laws ch. 175B, § 3) ..	18
Minnesota (Minn. Stat. § 60A.21)	18
Mississippi (Miss. Code Ann. § 83-21-45)	18
Missouri (Mo. Rev. Stat. §§ 375.281, 375.301) ...	19
Montana (Mont. Code Ann. §§ 33-1-614, 33-1-615)	19

Page

Nebraska (Neb. Rev. Stat. §§ 44-2002, 44-2005) . . 19

Nevada (Nev. Rev. Stat. §§ 680A.070, 685B.030, 685B.060) 19

New Hampshire (N.H. Rev. Stat. Ann. § 606-B:6) 18

New Jersey (N.J. Stat. Ann. §§ 17:51-2, 17:51-3) . . . 19

New Mexico (N.M. Stat. Ann. § 59A-15-8) 8

New York (N.Y. Ins. Law § 1213) 18

North Carolina (N.C. Gen. Stat. § 58-16-35) 19

North Dakota (N.D. Cent. Code § 26.1-02-12) 19

Ohio (Ohio Rev. Code Ann. §§ 3901.17, 3901.18) 19

Oregon (Or. Rev. Stat. §§ 746.340, 746.360) 19

Pennsylvania (40 Pa. Cons. Stat. § 46) 19

Puerto Rico (P.R. Laws Ann. tit. 26, § 1006) 19

Rhode Island (R.I. Gen. Laws §§ 27-16-1.2, 27-16-1.5) 19

Cited Authorities

	Page
South Carolina (S.C. Code Ann. § 38-25-550)	19
South Dakota (S.D. Codified Laws § 58-8-13)	19
Tennessee (Tenn. Code Ann. § 56-2-607)	19
Texas (Tex. Ins. Code Ann. Art. 1.36)	19
Utah (Utah Code Ann. § 31A-15-107)	19
Vermont (Vt. St. Ann. tit. 8, § 3387)	19
Virginia (Va. Code Ann. § 38.2-806)	19
West Virginia (W. Va. Code § 33-4-13)	19
Wyoming (Wyo. Stat. Ann. §§ 26-12-204, 26-12-205)	19
N.Y. Comp. Codes of R. & Regs. tit. 11, § 125.4(e)	15
N.Y. Ins. Law § 1101	2
N.Y. Ins. Law § 1101(b)(2)(G)	7
N.Y. Ins. Law § 1102	2
N.Y. Ins. Law § 1102(a)	7
N.Y. Ins. Law § 1213	*passim*

Cited Authorities

	Page
N.Y. Ins. Law § 1213(a)	13
N.Y. Ins. Law § 1213(b)	7
N.Y. Ins. Law § 1213(c)	7
N.Y. Ins. Law § 1213(c)(1)	5
N.Y. Ins. Law § 1301	2
N.Y. Ins. Law § 1301(14)	15
N.Y. Ins. Law § 4104	2
N.Y. Ins. Law § 4104(a)	14
N.Y. Ins. Law § 4104(d)	14
28 U.S.C. § 1254	1
28 U.S.C. § 2403(b)	1
United States Constitution:	
Fourteenth Amendment	i, 2, 3

Cited Authorities

Page

Other Authorities:

Article 64 of Mexico's General Law of Insurance Institutions and Mutual Companies 3

4 W. Blackstone, *Commentaries* 16

Carter, *Reinsurance* (2d ed. 1983) 17, 18

C. Hitchcock & P. Biging, *Tactical Use of State Laws Requiring Unauthorized Insurers to Post Preanswer Security*, 31 Tort & Ins. Law J. 767 (Spring 1996) 19

2 F. Pollack & F. Maitland, *The History of English Law* (1968) 16

Strain, *Reinsurance* (rev. ed. 1997) 17, 18

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided May 4, 2000 ..... 1a

Appendix B — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed May 4, 2000 ..... 14a

Appendix C — Default Judgment Of The United States District Court For The Southern District Of New York Dated And Filed May 17, 1999 .. 19a

Appendix D — Order Of The United States District Court For The Southern District Of New York Dated August 18, 1993 ..... 21a

Appendix E — Memorandum Opinion And Order Of The United States District Court For The Southern District Of New York Dated June 16, 1992 ..... 25a

Appendix F — Report And Recommendation Of The United States District Court For The Southern District Of New York Dated April 13, 1992 .... 29a

Appendix G — Report And Recommendation Of The United States District Court For The Southern District Of New York Dated March 23, 1992 ... 31a

Appendix H — Relevant Statutes 43a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Seguros La Republica, S.A. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on May 4, 2000.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 212 F.3d 138 (2d Cir. 2000) and is reprinted in Appendix ("App.") A hereto. The unreported Summary Order of the Second Circuit, issued on the same day as the reported opinion, is reprinted in Appendix B. The Default Judgment entered by the United States District Court for the Southern District of New York on May 18, 1999, is reprinted in Appendix C. The Order of the District Court entered on August 18, 1993, is reprinted in Appendix D. The Memorandum Opinion and Order entered by the District Court on June 16, 1992, the April 13, 1992 Report and Recommendation, and the March 23, 1992 Report and Recommendation, are reprinted in Appendixes E, F and G, respectively.

STATEMENT OF JURISDICTION

The Second Circuit filed its opinion on May 4, 2000. (App. A). The jurisdiction of this Court rests on 28 U.S.C. § 1254. Because petitioner challenges the constitutionality of Section 1213 of the New York Insurance Code, the provisions of 28 U.S.C. § 2403(b) may apply. Petitioner has served this Petition upon the Office of the Attorney General of the State of New York. Neither the District Court nor the Second Circuit certified to the Attorney General of the State of New York that the constitutionality of Section 1213 was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, as well as Sections 1101, 1102, 1213, 1301 and 4104 of the New York Insurance Code, which are reprinted in Appendix H.

STATEMENT OF THE CASE

On April 12, 1990, American Centennial Insurance Company ("ACIC"), a Delaware insurance company located first in New Jersey and later in Delaware, filed suit against Seguros La Republica, S.A. ("La Republica"), a Mexican insurance company located in Mexico City, D.F., in the United States District Court for the Southern District of New York. In its Complaint, ACIC alleged that: (i) it "issued to its insureds various insurance policies;" (ii) it "entered into reinsurance agreements, memorialized in certificates of facultative reinsurance issued by [La Republica] to ACIC, pursuant to which [La Republica] agreed and was obligated to reimburse ACIC for a share of losses and expenses arising from the underlying insurance policies;" (iii) it "paid losses and expenses to, or on behalf of, its insureds;" and (iv) La Republica's share of ACIC's losses and expenses under the facultative certificates was $3,475,647.27. An exhibit to the Complaint identified the twenty-six separate facultative certificates by certificate number and by the reinsured, ACIC insurance policy number, and set forth the amount ACIC sought to collect under each certificate. ACIC alleged it was due this amount under alternate theories of liability. ACIC also requested a judgment declaring that La Republica "is obligated to pay amounts that come due under the facultative certificates in the future when and as billed."

On October 18, 1990, La Republica filed its motion to dismiss the Complaint on the ground that the District Court lacked personal jurisdiction over it and because La Republica was not properly served with process in Mexico. On April 8, 1991, the District Court denied that motion, and on May 7, 1991, La Republica filed its Answer to the Complaint, denying all liability for amounts allegedly due under the facultative certificates. On June 28, 1991, ACIC filed a motion requesting the District Court to require La Republica to post a pre-answer bond pursuant to Section 1213 of the New York Insurance Code, N.Y. Ins. Law § 1213 (McKinney 1985) ("Section 1213"), or to strike La Republica's Answer. Over La Republica's objections, and rejecting La Republica's argument that Section 1213 violated La Republica's right to due process under the Fourteenth Amendment to the United States Constitution, the District Court granted that motion and ordered La Republica to post a $5,700,000 bond to secure payment of any final judgment in both this action, in which ACIC sought $3,475,647.27, and in a related proceeding pending between the parties in the District Court. (App. E). Although the related proceeding was later dismissed, *American Centennial Ins. Co. v. Seguros La Republica*, 1996 WL 304436 (S.D.N.Y. 1996), the amount of the bond remained unchanged.

On July 21, 1992, La Republica's counsel advised the District Court that it could not post the bond, and subsequently explained to the District Court that Article 64 of Mexico's General Law of Insurance Institutions and Mutual Companies prohibited La Republica from pledging its assets, which it would be required to do in order to obtain a pre-answer bond. Nonetheless, ACIC moved to strike La Republica's Answer and to enter a default judgment. Before ruling on that motion, the District Court first conducted an

evidentiary hearing to determine whether it had personal jurisdiction over La Republica. (App. D). Upon finding such jurisdiction, the District Court struck La Republica's Answer, and, after conducting an evidentiary hearing on damages, entered a default judgment against La Republica in the amount of $11,801,024.98, and issued a declaration that "by virtue of Defendant's default in this matter, . . . Defendant is obligated to pay any amounts billed by Plaintiff in the future arising out of the facultative certificates listed in Exhibit B to the Court's Order and Opinion dated May 10, 1999." (App. C).

On June 16, 1999, La Republica appealed the default judgment to the United States Court of Appeals for the Second Circuit. In its published opinion, the Second Circuit affirmed the District Court's ruling that Section 1213 was constitutional, but did so on different grounds. (App. A). While the District Court held that this Court's analysis under *Connecticut v. Doehr*, 501 U.S. 1 (1991), and other "creditor's remedies cases" were not applicable, the Second Circuit held that Section 1213 was an attachment statute, that the standards set forth in *Doehr* were applicable, but that the statute conformed to those standards. In a separate unpublished summary order entered the same day, the Second Circuit vacated and remanded part of the District Court's rulings regarding damages, and affirmed the District Court's remaining rulings regarding damages, personal jurisdiction and service of process. (App. B). La Republica does not concede and contests the correctness or validity of those rulings, and it does not waive any future recourse under Mexican law relating thereto.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S RULING THAT SECTION 1213 AUTHORIZES A CONSTITUTIONAL PRE-JUDGMENT ATTACHMENT CONTRADICTS THIS COURT'S RULING IN *DOEHR v. CONNECTICUT*

Section 1213(c)(1) requires that before any unauthorized foreign or alien insurer files a pleading in a lawsuit brought against it, the insurer must either post a bond with the clerk of court in an amount "sufficient to secure payment of any final judgment which may be rendered in the proceeding" or obtain a New York insurance license. In this case, the District Court ordered La Republica to post a $5,700,000 bond, and when La Republica did not do so, the District Court struck La Republica's Answer, held La Republica in default, and entered judgment against La Republica in the amount of $11,801,024.98. In rejecting La Republica's argument that Section 1213 violated its right to due process, the District Court held that this Court's holding in *Doehr v. Connecticut*, 501 U.S. 1 (1991), did not apply. On appeal, the Second Circuit correctly held that Section 1213 "is the functional equivalent" of a prejudgment attachment and that the due process standards set forth in *Doehr* applied. However, the Second Circuit's application of those standards contradicts this Court's decision in *Doehr*, and erred in finding that Section 1213 is constitutional.

A. Section 1213 Impaired La Republica's Property Interest In $5,7000,000 Of Its Assets

The first inquiry in determining the constitutionality of a pre-judgment attachment statute is whether there is a significant private interest which will be affected by the attachment. *Doehr*, 501 U.S. at 11. As this Court held in *Doehr*, an attachment need not be a complete or permanent deprivation of property in order to trigger due process concerns. *Id.* at 12. Instead, "the temporary or partial impairment to property rights that attachments, liens and similar encumbrances entail are sufficient to merit due process protection." *Id.* The Second Circuit correctly held that Section 1213's requirement of posting a bond is the equivalent of an attachment because it forces foreign insurers "to place some of their assets in the hands of the United States courts for an indefinite period" during which time the insurer "would have no access to those assets. (App. A at 7a, *quoting*, *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995)). Thus, Section 1213 affects La Republica's significant property interest in $5,700,000 of its assets.

Although the Second Circuit acknowledged that Section 1213 had this effect, it nonetheless held that La Republica had no protectable interest at stake because La Republica had "an alternate means of protecting its property: it will be excused from the requirement if it obtains a license to do an insurance business in New York." (App. A at 11a). Thus, the Second Circuit held that the security requirement of Section 1213 was "simply a means of avoiding state licensing requirements, a right the insurer does not have." (App. A at 11a). This ruling is wrong because it assumes that La Republica must be licensed in order to enter into

reinsurance contracts. However, New York does not require La Republica or any other reinsurer to obtain a license in order to legally engage in reinsurance transactions, including the transactions which were the subject matter of this lawsuit. Under Section 1102(a) of the New York Insurance Code, N.Y. Ins. Law § 1102(a) (McKinney 1985), no person or entity may do an "insurance business" in the State of New York unless authorized to do so by a license. However, the term "insurance business" does *not* include reinsuring risks of insurance companies. N.Y. Ins. Law § 1101(b)(2)(G) (McKinney 1985).[1] Because a reinsurer such as La Republica does not have to obtain an insurance license in order to legally enter into a reinsurance transaction, La Republica did not need to "avoid state licensing requirements" by posting a bond. (App. A at 11a). Thus, the Second Circuit's determination that La Republica did not have any interests affected by the pre-judgment attachment was clearly wrong. Instead, the District Court's order requiring La Republica to post a $5,700,000 bond pursuant to Section 1213 significantly affected La Republica's property interest in its assets.

---

1. The Second Circuit relied upon the language of Section 1102(a) in finding that the pre-answer security requirement in Section 1213(c) applied to reinsurance companies such as La Republica. (App. A at 4a-6a). In the District Court La Republica unsuccessfully argued that while the service of process provisions in Section 1213(b) may be applicable to reinsurers through Section 1102(a), the pre-answer bond requirements in Section 1213(c) are not. La Republica's argument was predicated on the fact that the "doing of an insurance business" language in Section 1102(a) was relevant only to the similar language contained in the service of process provision of Section 1213(b).

B. Imposing a $5,700,000 Pre-Answer Bond Without First Making A Preliminary Determination Of The Merits Of The Plaintiff's Claims Is Contrary To The Rulings Of This Court In *Doehr, Fuentes* And *Sniadach* And Creates A Substantial And Unconstitutional Risk Of The Erroneous Deprivation Of La Republica's Property

The second inquiry into the constitutionality of a pre-judgment attachment statute is whether there is a substantial risk that the attachment statute will erroneously deprive the defendant of its property. *Doehr*, 501 U.S. at 12. In *Doehr*, this Court held that a Connecticut statute which permitted the attachment of property merely because the plaintiff was able to allege a complaint which survived a motion to dismiss was unconstitutional because the risk of erroneous deprivation was too great:

> Permitting a court to authorize attachments merely because the plaintiff believes that the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these circumstances is self evident and too great to satisfy the requirements of due process absent any countervailing consideration.

Id. at 13. These same considerations show that Section 1213 deprives La Republica of property without due process of

law. Like the statute at issue in *Doehr*, Section 1213 requires a court to impose a bond upon a defendant merely because the plaintiff is able to state a facially valid complaint, even if the defendant denies the claims raised and disputes the facts alleged in that complaint. In this case, La Republica filed an answer which disputed the allegations made in the complaint and denied liability, but the District Court nonetheless ordered La Republica to post a $5,700,000 bond. Thus, like the Connecticut statute at issue in *Doehr*, Section 1213 presents a substantial risk of erroneous deprivation of La Republica's property. Indeed, this risk is clearly demonstrated by the fact that one of the two cases for which the bond was ordered was subsequently dismissed, and in this case, the Second Circuit held that the District Court erroneously awarded the plaintiff $740,055.77, before interest, and remanded that part of the award for further proceedings. (App. B at 17a).

The Second Circuit attempted to distinguish the holdings of this Court in *Doehr*, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), on the ground that those cases involved statutes providing for *ex parte* attachments, whereas Section 1213 "mandates court supervision before an insurer may be required to post [a] preanswer security" and that defendants are provided with "notice and an opportunity to be heard." (App. A at 11a). However, La Republica was not given an opportunity to be heard on the constitutionally significant issue of the likelihood of success of the plaintiffs' claims against La Republica before the pre-answer bond was imposed. Instead, the District Court merely rubber-stamped the plaintiff's request for a $5,700,000 pre-answer bond, ruling that "the merits of the case have no bearing on the posting of security." (App. G at 41a). However, as this Court held in

Doehr, *Fuentes*, and *Sniadach*, due process requires that a court provide actual supervision by making a preliminary determination into the merits of the plaintiff's claim before granting the attachment. *See Doehr*, 501 U.S. at 14 ("The State urges that the reviewing judge normally reviews the complaint as well [as the plaintiff's affidavit], but concedes that the complaint may also be conclusory. It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions"); *Fuentes*, 407 U.S. at 83 ("Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides — and does not generally take even tentative action until it has itself examined the support for the plaintiff's position"); *Sniadach*, 395 U.S. at 343 (HARLAN, J, concurring) ("I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use"). Because Section 1213 does not provide for any pre-attachment determination of the merits of the plaintiff's claim, the statute presents a substantial, and unconstitutional, risk of erroneous deprivation of a defendant's property.

The Second Circuit also stated that it would uphold the constitutionality of Section 1213 even if the bond were imposed *ex parte* because the plaintiff's claim, that La Republica "owes it a sum of money under a set of contracts — appears to fall into the category of cases cited in *Doehr* as 'lend[ing] themselves to accurate ex parte assessments of the merits.' " (App. A at 12a n.3). This statement, however, is wrong. First, the District Court did

not even make an *ex parte* assessment of the merits of the plaintiff's claim before it ordered La Republica to post a $5,700,000 pre-answer bond. Instead, it held that "the merits of the case have no bearing on the posting of security." (App. G at 41a). Further, the issues in this case do not lend themselves "to accurate ex parte assessments of the merits." (App. A at 12a). The claims asserted by ACIC against La Republica involve issues of interpretation of both the twenty-six facultative reinsurance certificates La Republica allegedly issued to ACIC and the twenty-six insurance policies ACIC issued to its insureds. Unlike a collection case for an amount due for goods or services rendered, the claims by ACIC involve a fact-intensive inquiry as to whether the amount claimed arose from the type of occurrence and the time period covered by the reinsurance contract. In many cases, the occurrence at issue was pollution which took place over a period of decades.

For example, ACIC alleged that it paid loss adjustment expenses to, or on behalf of, its insureds under the insurance policies it issued, and sought payment by La Republica for its share of those expenses under the facultative reinsurance certificates. However, ACIC later conceded that $687,068.55 of the expenses it sought from La Republica were not paid to or on behalf of its insureds, as alleged in the complaint, but instead were incurred in defending itself in declaratory judgment lawsuits brought by ACIC's insureds against ACIC seeking insurance coverage under the insurance policy. This concession would not have been made in an *ex parte* assessment of the merits of the complaint. Nor could the issue have been addressed by a motion to dismiss the Complaint because the Complaint itself did not make clear that ACIC was seeking these recoveries. Nonetheless, the District Court awarded the plaintiff these amounts, holding

that La Republica waived all objections to that award through its default. The Second Circuit vacated that award, finding that the issues of "whether the policies covered the declaratory judgment expenses and whether the complaint adequately requested this relief" were not waived by La Republica's default. (App. B at 17a). Thus, the District Court was unable to make an accurate assessment of the merits of ACIC's claim for recovery of these declaratory judgment expenses.

C. Neither The Plaintiff Nor The State of New York Has Any Significant Interests Justifying Imposing a Pre-Answer Bond Upon La Republica

The third inquiry into the constitutionality of a pre-judgment attachment statute requires "principal attention to the interests of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interests the government may have in providing the procedure or forgoing the added burden of providing the greater protections." *Doehr*, 501 U.S. at 11. However, the State's "substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves." *Id.* at 16. In *Doehr*, the plaintiff had no existing interest in the defendant's property when he sought the attachment, and his only interest in the attachment was "to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action." *Id.* This Court held that this *de minimus* interest did "not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery." *Id.*

Although the plaintiff in this case had no existing interest in La Republica's assets at the time it sought the imposition

of the pre-answer bond, the Second Circuit nonetheless held that the plaintiff shared with the State of New York the interests of "ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid, instead of requiring claimants to resort to far-flung forums for satisfaction of their judgments," and "in ensuring that businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim," and that these interests were sufficient to support the constitutionality of Section 1213. (App. A at 9a, 10a). However, none of these state interests are reflected in the New York Insurance Code and they are not applicable to reinsurance companies.

The Second Circuit relied upon the New York Court of Appeals' decision in *Curiale v. Ardra Insurance Co., Ltd.*, 88 N.Y.2d 268, 277 (1996), in holding that the purpose of Section 1213 was to prevent New York citizens from resorting to "far flung forums for satisfaction of their judgments." (App. A at 9a, *quoting Curiale*, 88 N.Y.2d at 277). However, neither the language of Section 1213 nor the legislative history quoted by the court in *Curiale* supports this supposed state interest. The purpose of Section 1213, as stated in its preamble, is to provide New York citizens a means by which to serve process upon unlicensed insurance companies and bring actions against them in New York courts. N.Y. Ins. Law § 1213(a) (McKinney 1985).

Nowhere in Section 1213 does it state that its purpose is to ensure the availability of funds to satisfy possible future judgments. The New York Insurance Code itself does not reflect this interest because it does not require *licensed* foreign insurers to maintain assets in the State of New York

in order to satisfy judgments brought against them. The only requirement imposed upon licensed foreign property and casualty insurers to maintain assets in the State of New York is that the insurer deposit no more than $500,000 with the New York Superintendent of Insurance. N.Y. Ins. Law §§ 4104(a), 4104(d). However, a licensed foreign insurer is excused from doing so if the foreign insurer provides a certificate showing that it deposited that amount with the "proper state official of the state under whose laws such company is organized." N.Y. Ins. Law § 4104(d). Thus, the New York Insurance Code anticipates that a licensed foreign insurer may not have any assets within the State and that a New York citizen could be required to resort to a "far flung forum" to enforce a judgment against that insurer. Finally, as this Court held in *Doehr*, making assets available to satisfy a future judgment in a case is an insufficient interest to justify a pre-judgment attachment. *Doehr*, 501 U.S. at 16.

The legislative history shows that in enacting Section 1213, the New York legislature was concerned about "legitimate expectations of the public" in dealing with unlicensed insurers:

> In view of the regulations of financial affairs of insurers, the act of a foreign or alien insurer in issuing and delivering policies, soliciting applications for insurance, collecting premiums on (and thus keeping in force) existing insurance, or transacting business in such a way that it appears to the public view as a lawful and authorized insurer, is, in a practical sense a holding out or representation [sic] to the insured that it will conduct its affairs in such a way that funds will be accessible for satisfaction of any judgment based on a claim connected with the contract.

Curiale, 88 N.Y.2d at 275-276. These "expectations" do not exist in a reinsurance transaction. First, reinsurers do not deal with the public but instead deal solely with sophisticated insurance companies such as the plaintiff. Thus, the consumer protection interests underlying Section 1213 are not present. In addition, insurance companies have no expectation that foreign reinsurers such as La Republica maintain any assets in New York to pay claims or satisfy judgments against them. Indeed, the New York Insurance Code recognizes that reinsurance companies' assets may be located in a different state or country, and thus puts the burden on the domestic insurance company seeking to take credit for such reinsurance on its financial statement to first arrange security for payment by the reinsurer, such as withholding from the reinsurer all or a portion of the reinsurance premium and placing it in a trust account located in New York. N.Y. Comp. Codes of R. & Regs. tit. 11, § 125.4(e); N.Y. Ins. Law § 1301(14) (McKinney 1985). In this case, the plaintiff knew it was dealing with a Mexican reinsurance company which had no assets within the State of New York, and therefore arranged for security for payment by La Republica by placing all of the reinsurance premiums, over $9,000,000, in a trust account in New York, and later withdrew that entire account to pay various claims under the reinsurance contracts.

Section 1213 is being used in this case to punish La Republica for entering into reinsurance contracts with ACIC without first having a New York insurance license, even though New York law does not require reinsurers like La Republica to be licensed. This misplaced sense of punishment, being required to either post a $5,700,000 pre-answer bond or be held in default, is the modern-day resurrection of the ancient, and now plainly unconstitutional,

custom of outlawry, under which "he who defied [the law] was outside its sphere; he was outlaw." 2 F. Pollack & F. Maitland, *The History of English Law* 449 (1968). A defendant was "exacted, proclaimed, or required to surrender, at five county courts" and if he "does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise." 4 W. Blackstone, *Commentaries* *319 (emphasis in original). In its original and most draconian form, outlawry relegated the defendant to a Hobbesian state of nature:

> He who breaks the law has gone to war with the community; the community has gone to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man," he is a wolf.

2 Pollack & Maitland at 449. *See also* 4 W. Blackstone at *320 ("having renounced the law, [the outlaw] was to be dealt with as in a state of nature").

It is no surprise that outlawry, whatever its vigor in medieval law, cannot be reconciled with the due process of law guaranteed by the Constitution. In rejecting the proposition that courts have equitable power "to suppress an answer and thereupon render a decree *pro confesso*" in *Hovey v. Elliott*, 167 U.S. 409, 444 (1897), this Court explained that "if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be part of the

chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." Consequently, "the severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law." *Green v. United States*, 356 U.S. 165, 171 (1958). The gravamen of *Hovey*, *Green*, and other cases[2] is, of course, that the constitutional rejection of outlawry has rejected with it even the modern, less barbaric forms of the practice. In this case, La Republica did not break the law by entering into the reinsurance contracts with ACIC. It is nevertheless being punished, unconstitutionally, as if it had.

II.

THE QUESTION PRESENTED IS IMPORTANT BECAUSE IT HAS A PROFOUND EFFECT ON THE GLOBAL REINSURANCE MARKET

The purpose of reinsurance is to protect an insurance company against losses under its insurance policies. Strain, *Reinsurance* 13 (rev. ed. 1997). Reinsurance also permits an insurance company to issue insurance policies for an amount larger than the amount the insurer is ordinarily willing to retain for its own account. *Id. See also* Carter, *Reinsurance* 8 (2d ed. 1983) ("Reinsurance also provides an insurer with additional underwriting capacity in that he can

---

2. *See also Degen v. United States* 517 U.S. 820, 828 (1997) (fugitive disentitlement doctrine did not permit district court to enter summary judgment in favor of government in civil forfeiture case because such a sanction would be an "arbitrary response"); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244-46 (1993) (federal court may not use disentitlement doctrine to dismiss an appeal by a fugitive before the appeal was filed).

both accept larger risks than otherwise would be possible and sometime accommodate existing policyholders by writing types of business which normally he would prefer to avoid"). This extra capacity and flexibility provided by reinsurance allows insurers of all size to compete for insurance business, which ultimately benefits the insurance consumer. Carter at 8-9. However, in order to take full advantage of the benefits of reinsurance, domestic insurance companies need access to the entire global reinsurance market. Strain at 14. If a state imposed a licensing requirement on reinsurance companies, then insurance companies from that state would have access to only a small portion of the global reinsurance market. Insurers would be less able to financially or geographically spread risks to protect themselves and their insureds from catastrophic losses from events such as storms, fires, and earthquakes. It is for this reason that states do not require reinsurance companies to be licensed.

However, New York and twenty-six other states have enacted statutes which the Second Circuit and other courts have held as requiring reinsurers to either obtain an insurance license or post a pre-answer bond.[3] Private plaintiffs in these

---

3. Alabama (Ala. Code § 27-10-53); Alaska (Alaska Stat. § 21.33.031); California (Cal. Ins. Code § 1616); Colorado (Col. Rev. Stat. § 10-3-1004); Connecticut (Conn. Gen. Stat. § 38a-27); Hawaii (Haw. Rev. Stat. § 431:8-208); Illinois (215 ILCS 5/123); Kansas (Kan. Stat. Ann. § 40-2003); Kentucky (Ky. Rev. Stat. Ann. § 304.11-040); Louisiana (La. Rev. Stat. Ann. § 22:1255); Massachusetts (Mass. Gen. Laws ch. 175B, § 3); Minnesota (Minn. Stat. § 60A.21); Mississippi (Miss. Code Ann. § 83-21-45); New Hampshire (N.H. Rev. Stat. Ann. § 606-B:6); New Mexico (N.M. Stat. Ann. § 59A-15-8); New York (N.Y. Ins. Law § 1213);

(Cont'd)

cases, including those who have no connection with the state, are increasingly using these statutes to provide them with a tactical advantage in lawsuits and arbitrations against reinsurers. C. Hitchcock & P. Biging, *Tactical Use of State Laws Requiring Unauthorized Insurers to Post Preanswer Security*, 31 Tort & Ins. Law J. 767, 768-9 (Spring 1996) ("Accordingly, recognizing the tactical leverage afforded thereby, ceding insurers (and state insurance commissioners in their capacity as liquidators of insolvent ceding insurers) increasingly have invoked these provisions in an effort to

---

(Cont'd)

North Carolina (N.C. Gen. Stat. § 58-16-35); North Dakota (N.D. Cent. Code § 26.1-02-12); Puerto Rico (P.R. Laws Ann. tit. 26, § 1006); South Carolina (S.C. Code Ann. § 38-25-550); South Dakota (S.D. Codified Laws § 58-8-13); Tennessee (Tenn. Code Ann. § 56-2-607); Texas (Tex. Ins. Code Ann. Art. 1.36); Utah (Utah Code Ann. § 31A-15-107); Vermont (Vt. St. Ann. tit. 8, § 3387); Virginia (Va. Code Ann. § 38.2-806); West Virginia (W. Va. Code § 33-4-13). In addition, the following states have enacted similar statutes but exclude reinsurers from their scope: Arizona (Ariz. Rev. Stat. §§ 20-401.01(B)(2), 20-405); Arkansas (Ark. Code. Ann. §§ 23-65-204, 23-65-205); Delaware (Del. Code Ann. tit. 18, §§ 2106-2107); Florida (Fla. Stat. Ann. §§ 626.908, 626.912); Georgia (Ga. Code Ann. §§ 33-5-57, 33-5-59); Guam (22 Guam Code Ann. §§ 15204, 15207); Idaho (Idaho Code §§ 41-1208, 41-1210); Indiana (Ind. Code §§ 27-4-4-4, 27-4-4-6); Iowa (Iowa Code §§ 507A.4, 507A.7); Maine (Me. Rev. Stat. Ann. tit. 24-A, §§ 2106, 2107); Missouri (Mo. Rev. Stat. §§ 375.281, 375.301); Montana (Mont. Code Ann. §§ 33-1-614, 33-1-615); Nebraska (Neb. Rev. Stat. §§ 44-2002, 44-2005); Nevada (Nev. Rev. Stat. §§ 680A.070, 685B.030, 685B.060); New Jersey (N.J. Stat. Ann. §§ 17:51-2, 17:51-3); Ohio (Ohio Rev. Code Ann. §§ 3901.17, 3901.18); Oregon (Or. Rev. Stat. §§ 746.340, 746.360); Pennsylvania (40 Pa. Cons. Stat. § 46); Rhode Island (R.I. Gen. Laws §§ 27-16-1.2, 27-16-1.5); Wyoming (Wyo. Stat. Ann. §§ 26-12-204, 26-12-205).

compel reinsurers to post the entire amount of any claimed reinsurance recoveries before any litigation or arbitration of the merits of their claims has been undertaken"). Thus, reinsurers may be required to post bonds of millions, or tens of millions, of dollars before they can even answer the claims, and deny the allegations, brought against them. *Id.* If the reinsurer is unable to post the bond, default judgment is entered against it, regardless of the merits of the plaintiff's claim.

This Court should determine the constitutionality of pre-answer bond statutes such as Section 1213 not only because of their widespread enactment, but also because of the significant effect these statutes have on the global reinsurance market. Only a few courts have addressed the issue of these statutes constitutionality, and, like the Second Circuit in this case, the other courts did not correctly apply the standards set forth by this Court in *Doehr*. *See, e.g.*, *Lakehead Pipe Line Co., Inc. v. American Home Assur. Co.*, 981 F. Supp. 1205 (D. Minn. 1997); *Mid-American Indemn. Ins. Co. v. King*, 1995 WL 407388 (S. Ct. Tex. 1995); *Trihedron Int'l Assur. Ltd. v. Superior Court*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (1990).

CONCLUSION

For the reasons stated herein, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

ALBERT E. FOWERBAUGH, JR.
Counsel of Record
MICHAEL R. HASSAN
R.R. MCMAHAN
LORD, BISSELL & BROOK
Attorneys for Petitioner
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0700

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MAY 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: January 26, 2000 Decided: May 4, 2000)

Docket No. 99-7721

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Plaintiff-Appellee,

— v. —

SEGUROS LA REPUBLICA, S.A.,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, STRAUB, and POOLER,

Circuit Judges.

* * *

PER CURIAM:

Seguros La Republica ("Seguros") appeals from a default judgment of the United States District Court for the Southern

District of New York (John F. Keenan, *Judge*). By a summary order filed concurrently with this opinion, we reject most of Seguros's claims on appeal. In this separate opinion, we address its argument that the security requirement of New York Insurance Law § 1213 violates the defendant's right to due process. For the reasons that follow, we affirm the District Court's order deciding that there was no due process violation. *See American Centennial Ins. Co. v. Seguros La Republica, S.A.*, No. 90 Civ. 2370, 1992 WL 147626 (S.D.N.Y. June 16, 1992) (adopting Magistrate Judge's Report and Recommendation, dated March 23, 1992, and rejecting the defendant's due process challenge to § 1213(c)).

BACKGROUND

This case arises out of Seguros's alleged failure to pay a predecessor-in-interest of British International Insurance Co. ("BIIC"), American Centennial Insurance Company ("ACIC"), pursuant to twenty-six reinsurance certificates. During the course of the litigation, ACIC moved for an order compelling Seguros to post pre-answer security in accordance with New York Insurance Law § 1213(c)(1)(A), which requires unauthorized foreign or alien insurers, such as Seguros, to post bonds or other security before they are permitted to defend a case on the merits in the New York courts.[1] Because

---

1. Section 1213(c)(1) specifically provides:

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with

(Cont'd)

Seguros notified the District Court that it would not post a bond or other security, ACIC filed a motion to strike Seguros's answer, which the District Court granted after a hearing on personal jurisdiction.

After a two-day hearing on damages, the District Court entered a default judgment against Seguros in the amount of $11,801,024.98. On appeal, Seguros argues, as it did before the District Court, that the security requirement of New York Insurance Law § 1213 violates its right to due process.

DISCUSSION

Section 1213 of the New York Insurance Law states that its intended purpose is to

> subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance

---

(Cont'd)

> such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or (B) procure a license to do an insurance business in this state.

N.Y. Ins. Law § 1213(c)(1) (McKinney 1985).

> contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such polices.

N.Y. Ins. Law § 1213(a) (McKinney 1985). The statute accomplishes this purpose in two ways: first, by declaring that certain activities on the part of the foreign unauthorized insurer constitute appointment of the New York Superintendent of Insurance as its attorney for service of process, *see* N.Y. Ins. Law § 1213(b)(1), and second, by mandating that out-of-state insurers post security or obtain a license in order to be allowed to participate in court proceedings in New York, *see* N.Y. Ins. Law § 1213(c)(1). Seguros challenges this second requirement here.

I. *Applicability of Section 1213 to Reinsurers*

Initially, we address § 1213's applicability to the circumstances of this case. Seguros argued in the District Court that § 1213 does not apply to reinsurers because "[r]einsurance contracts . . . are merely contracts of indemnity, not policies of insurance." The District Court rejected Seguros's claim, relying on *Morgan v. American Risk Mgmt., Inc.*, No. 89 Civ. 2999, 1990 WL 106837 (S.D.N.Y. July 20, 1990), which in turn relied on the language of another provision of the New York Insurance Law expressly providing that § 1213 applies to those engaged

in reinsurance transactions. *See* N.Y. Ins. Law § 1101(b)(2).[2] Although Seguros does not press this claim on appeal, we find it necessary to address the point, as this status resolution underpins the statute's applicability.

We agree with the court in *Morgan*, and those courts adopting its reasoning, that the argument that a reinsurance contract is not a "policy of insurance" or a "contract of insurance" is not sufficient to contravene the express language of § 1101(b)(2). *See Morgan*, 1990 WL 106837, at *6; *accord, e.g., John Hancock Property and Cas. Ins. Co. v. Universale Reinsurance Co. Ltd.*, 147 F.R.D. 40, 50 (1993) (adopting the reasoning of *Morgan*). Rather, the express language of § 1101(b)(2) demonstrates that "although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, . . . it did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and security requirement." *Morgan*, 1990 WL 106837, at *6.

---

2. Section 1101(b)(2) provides in relevant part:

> (2) Notwithstanding [the activities listed in subsection (1) that constitute "doing an insurance business"], the following acts or transactions . . . shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

N.Y. Ins. Law § 1101(b)(2) (McKinney 1985).

Finally, Seguros's argument, advanced in the District Court, that this express language is relevant only to the service of process provisions of subsection 1213(b), is without merit. As the District Court concluded, "it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to the security requirements." *American Centennial Ins. Co. v. Seguros La Republica, S.A.*, Nos. 90 Civ. 2370, 91 Civ. 1235, Report and Recommendation of Magistrate Judge Leonard Bernikow, at 6 (S.D.N.Y. Mar. 23, 1992).

II. *Due Process Challenge*

Seguros contends that the security requirement at issue is equivalent to a prejudgment attachment of its property and, under the test set forth by the Supreme Court in *Connecticut v. Doehr*, 501 U.S. 1 (1991), violates its right to due process. BIIC counters that the security requirement does not constitute an attachment and, in any event, complies with the due process requirements set forth by the Supreme Court for such procedures. We hold that the security requirement of § 1213 is the functional equivalent of an attachment, but that it satisfies the due process requirements of *Doehr*.

The plaintiff's argument that the security requirement is not an attachment is based largely on the New York Court of Appeals's determination that "section 1213(c) does not effect a seizure of property. The foreign or alien insurer is merely required to post security as a precondition of filing an answer in litigation over policies which the insurer has

issued." *Curiale v. Ardra Ins. Co., Ltd.*, 88 N.Y.2d 268, 278 (1996). We respectfully disagree with *Curiale*'s characterization of the security requirement.

First, the Supreme Court has never held that only "complete, physical, or permanent deprivations of real property . . . trigger[ ] due process concern." *Doehr*, 501 U.S. at 12. Rather, its "cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.* Moreover, we have previously characterized § 1213's security requirement as being equivalent to an attachment because "it would force foreign [insurers] to place some of their assets in the hands of the United States courts for an indefinite period. During that time, the [insurers] would have no access to those assets. All this is precisely the same result that would obtain if the foreign [insurer's] assets were formally attached." *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1996). The issue in *Stephens* was whether the provision in the Foreign Sovereign Immunities Act, prohibiting "attachment arrest and execution" of a foreign state's property, 28 U.S.C. § 1609, exempts foreign insurance companies that claim coverage under the FSIA from § 1213's security requirement. While the FSIA is not at issue in the case before us, we believe we are bound by *Stephens*'s characterization of § 1213's security requirement as a prejudgment attachment, especially given the Supreme Court's broad definition in *Doehr* of situations that implicate due process concerns, *see Doehr*, 501 U.S. at 12. Accordingly, analysis of whether § 1213's security requirement comports with due process — an issue not

addressed in *Stephens* — must proceed in light of the conclusion in *Stephens* that this requirement constitutes an "attachment" of the foreign insurance companies' property.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976), articulates the traditional balancing test employed by courts to determine whether a government deprivation of an individual's property violates due process. *See Doehr*, 501 U.S. at 10. The *Mathews* calculus instructs courts to determine the constitutional adequacy of prejudgment attachment procedures by balancing (1) the private interest involved, (2) the risk of an erroneous deprivation of that interest through the procedures utilized, as well as the probable value of additional procedural safeguards, and (3) the government's interest, including the burden that additional procedural requirements would impose. *See Mathews*, 424 U.S. at 325; *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 902 (2d Cir. 1992).

However, as the Supreme Court pointed out in *Doehr*, the balancing test set forth in *Mathews* directly applies only to cases in which "the government itself seeks to effect a deprivation [of property] on its own initiative." 501 U.S. at 10. By contrast, cases analyzing traditional prejudgment remedy statutes require application of a slightly altered balancing test, since they "ordinarily apply to disputes between private parties rather than between an individual and the government." *Doehr*, 501 U.S. at 10-11. In such cases, the first two factors remain the same as under *Mathews*, but the third factor, instead, requires "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interests the

government may have in providing the procedure or forgoing the added burden of providing the greater protections." *Id.* at 11. This alteration is warranted because "any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other's property." *Id.* As the Court specifically held in *Doehr*, "[t]he State's substantive interest in protecting any rights of the plaintiff cannot be more weighty than those rights themselves." *Id.* at 16. Therefore, in cases where the plaintiff's interest is "*de minimis*," the government's interest will not be significant enough to overcome due process concerns. *Id.*

In the case before us, the District Court held that the security requirement of § 1213 is "readily distinguishable" from "traditional prejudgment creditors' remedies." Similarly, relying largely on *Curiale*, BIIC argues that § 1213 is constitutional because it is distinguishable from traditional prejudgment creditors' remedies that have been held to violate due process in certain cases. *See Curiale*, 88 N.Y.2d at 278. The key distinction, both for the District Court and the court in *Curiale*, lies primarily in the importance of "the State's interest in ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid, instead of requiring claimants to resort to far-flung forums for satisfaction of their judgments," given that "insurers, licensed and unlicensed alike, capitalize on the legitimate expectations of the public that funds to satisfy judgments on insurance policies are readily available within the State." *Curiale*, 88 N.Y.2d at 275, 277; *see also* Jt. App. at 81-82 ("In the creditor's remedies cases the state has no substantial interest to protect

in providing plaintiffs with a prejudgment financial advantage over defendants. The state in the instant case has an interest in protecting its insureds and beneficiaries.") (internal quotation marks and citation omitted).

This conclusion, though correct, requires further explanation. As Seguros points out, under Supreme Court jurisprudence, the government's interest generally is not dispositive in cases where the deprivation of property results from a private individual — rather than the government itself — making use of government procedures. *See Doehr*, 501 U.S. at 10-11. However, Seguros's argument goes too far. *Doehr* does not indicate that the government's interest is inconsequential in cases where a private individual, as opposed to the government, acts. Rather, *Doehr* concludes that the government's interest can be no greater than that of the private litigant seeking attachment. *See Doehr*, 501 U.S. at 16. In *Doehr*, the "plaintiff's interest [was] *de minimis*." *Id.* In the instant case, by contrast, New York State shares with its citizens a significant interest in ensuring that businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim. In short, the State interest at stake in the enactment of § 1213's security requirement is far more substantial than that involved in the enactment and enforcement of traditional prejudgment attachment statutes, because it reflects the collective importance of the regulation to each of its citizens.

Furthermore, § 1213's security requirement passes constitutional muster under the first two prongs of the *Mathews-Doehr* balancing test, as *Curiale* persuasively

makes clear. First, in terms of the private interest involved, § 1213's security requirement, as discussed above, does deprive a foreign insurer of a significant property interest that implicates due process concerns. However, the insurer has an alternative means available to protect its property: it will be excused from the requirement if it obtains a license to do an insurance business in New York. *See* N.Y. Ins. Law § 1213(c)(1)(B). Thus, in reality the security requirement is simply a means of avoiding state licensing requirements, a right the insurer does not have. *See Curiale*, 88 N.Y.2d at 277 ("[T]he ability to conduct insurance business free from legitimate government regulation is not a constitutionally protected property or liberty interest.").

Second, there is little risk of an erroneous deprivation of an insurer's property rights and there are significant additional procedural safeguards. Unlike most prejudgment security statutes, § 1213 is not "available at a plaintiff's option, without any notice to the defendant," but is a "regulatory requirement imposed on all unlicensed foreign and alien insurers" and "mandates court supervision before an insurer may be required to post preanswer security." *Curiale*, 88 N.Y.2d at 278; *see also* § 1213(c)(1)(A). Thus, all insurers subject to § 1213(c) are "provided with notice and an opportunity to be heard before being subjected to the preanswer security requirement." *Curiale*, 88 N.Y.2d at 278; *cf. Doehr*, 501 U.S. at 14-16 (concluding that a prejudgment attachment of real property without prior notice was unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (finding unconstitutional state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk and the posting of a bond);

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (striking down statute that permitted a creditor to effect prejudgment garnishment of wages without notice to the wage earner or prior hearing).[3]

Finally, though not raised by Seguros, the fact that § 1213 does not require the posting of a security bond by the plaintiff in the event that the attachment ultimately is found to have been erroneously made does not render the statute unconstitutional in this Circuit. We specifically have stated that "because only a plurality of the Justices addressed this issue in *Doehr*, this Circuit has continued to adhere to our previously established position that a security bond need not be posted in connection with a prejudgment attachment in order to satisfy the requirements of due process." *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 402 (2d Cir. 1995).

Accordingly, though we agree with Seguros that the security requirement of § 1213 is properly characterized as

---

3. We need not reach the issue of whether, absent notice and court supervision, § 1213 would violate due process. We note, however, that BIIC's essential claim — that Seguros owes it a sum of money under a set of contracts — appears to fall into the category of cases cited in *Doehr* as "lend[ing] themselves to accurate *ex parte* assessments of the merits," since they "concern ordinarily uncomplicated matters that lend themselves to documentary proof." 501 U.S. at 14, 17 (internal quotations omitted); *see also Shaumyan v. O'Neill*, 987 F.2d 122, 126-27 (2d Cir. 1993) (upholding a Connecticut statute permitting ex parte prejudgment attachment of a home in part because it involved "an outstanding sum certain due under [a] contract").

a prejudgment attachment, we conclude that it comports with due process.

CONCLUSION

For the foregoing reasons, we affirm the District Court's order deciding that there was no due process violation in applying the security requirement of New York Insurance Law to Seguros.

APPENDIX B — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 4, 2000

UNITED STATES COURT OF APPEALS — FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May, two thousand.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER,
Circuit Judges.

No. 99-7721

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Plaintiff-Appellee,

v.

SEGUROS LA REPUBLICA, S.A.,

Defendant-Appellant.

Appendix B

SUMMARY ORDER

* * *

Appeal from the United States District Court for the Southern District of New York (John F. Keenan, *Judge*).

AFTER SUBMISSION AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED in part and VACATED and REMANDED in part.

This case arises out of Defendant-Appellant Seguros La Republica, S.A.'s ("Seguros") alleged failure to pay a predecessor-in-interest of British International Insurance Co. ("BIIC"), American Centennial Insurance Company ("ACIC"), pursuant to twenty-six reinsurance certificates. During the course of the litigation, ACIC moved for an order compelling Seguros to post pre-answer security in accordance with New York Insurance Law § 1213, which requires unauthorized foreign or alien insurers, such as Seguros, to post bonds or other security before they are permitted to defend a case on the merits in the New York courts. *See* N.Y. Ins. Law § 1213(c)(1)(A) (McKinney 1985). Because Seguros notified the court that it would not post a bond or other security, ACIC filed a motion to strike Seguros's answer, which the District Court granted after a hearing on personal jurisdiction. After a two-day hearing on damages, the District Court entered a default judgment against Seguros in the amount of $11,801,024.98. On appeal, Seguros argues, as it did before the District Court, that

(1) the security requirement of New York Insurance Law § 1213 violates Seguros's right to due process; (2) that service of process in this action was not in accordance with Mexican law; (3) that the District Court did not have personal jurisdiction over Seguros; and (4) that the plaintiff failed to adequately prove the damages awarded.

In a separate published opinion filed simultaneously with this order, we consider and reject Seguros's claim that § 1213's security requirement violates its right to due process. In this summary order, we dispose of Seguros's remaining arguments, and we affirm the District Court's decisions on those issues, with the exception of two damages-related items noted below, for substantially the reasons outlined in the opinions of the District Court. *See American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370 (S.D.N.Y. Apr. 8, 1991) (denying, *inter alia*, Seguros's motion for an order quashing service of process because service was done in accordance with the law of Mexico and, therefore, in accordance with Fed. R. Civ. P. 4(i)(1)(A)); *American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370, 1995 WL 731630 (S.D.N.Y. Dec. 8, 1995) (agreeing, upon *de novo* review of evidence presented at a three-day hearing, with the recommendation of the Magistrate Judge that the District Court had personal jurisdiction over Seguros); *American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370 (S.D.N.Y. May 10, 1999) (adopting the Magistrate Judge's recommended ruling of October 30, 1998, establishing the amount of damages after a two-day hearing).

Appendix B

As to whether ACIC is entitled to reimbursement from Seguros for legal expenses spent in declaratory judgment actions, we remand. ACIC's complaint seeks reimbursement for losses and expenses paid "[p]ursuant to the insurance policies . . . to, or on behalf of its insureds." Seguros argues that the amounts spent in seeking declaratory relief were for ACIC's own expenses in opposing coverage for its insureds, as opposed to expenses paid to its insureds and, therefore, are not covered under the policies or requested relief in the complaint. This issue presents a pure question of law, the determination of which is not waived by the default. *See Alexander & Alexander v. These Certain Underwriters at Lloyd's, London*, 136 F.3d 82, 86 (2d Cir. 1998) ("Under New York law 'the initial interpretation of a contract is a matter of law for the court to decide.' "). Accordingly, we remand to the District Court to determine whether the policies covered the declaratory judgment expenses and whether the complaint adequately requested this relief.

In addition, Seguros contends that ACIC failed to present any proof of $52,987.22 of the $910,630.46 that ACIC claimed to have paid to its insureds. ACIC does not address this claim in its brief on appeal, and it is not clear how the District Court resolved this issue. Therefore, we remand to the District Court to determine whether the record supports Seguros's assertion that no proof was offered as to $52,987.22 in claims paid by AIIC, if in fact Seguros raised that argument below.

Appendix B

Accordingly, the judgment of the District Court is affirmed in part and vacated and remanded in part.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

s/ Lucille Carr — 5/4/00
By: — Date

APPENDIX C — DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED MAY 17, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 CIV 2370 (JFK)

BRITISH INTERNATIONAL INSURANCE CO., LTD.,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

DEFAULT JUDGMENT

Whereas the above entitled action having been brought before this Court and the matter having been assigned to the Honorable John F. Keenan, United States District Judge, and the matter of an inquest for damages having been referred to the Honorable Leonard Bernikow, United States Magistrate Judge, who on October 30, 1998 having issued his Report and Recommendation, and the Court, on May 10, 1999 having issued its Opinion (82329) and Order adopting the Report of the Magistrate Judge in its entirety and directing the Clerk to enter a default judgment in favor of BIIC in the amount of $11,251,696.35 with interest on this amount from October 30, 1998 till date of judgment amounting to $549,328.63, for a judgment totaling $11,801,024.98, it is,

Appendix C

ORDERED, ADJUDGED, AND DECREED, That pursuant to the Court's Opinion (82329) and Order dated May 10, 1999, the Report and Recommendation of Magistrate Judge Bernikow dated October 30, 1999 is adopted in its entirety, and a default judgment is hereby entered in favor of BIIC in the amount of $11,251,696.35 plus interest at 9% from October 30, 1999 until the date of this judgment, amounting to $549,328.63, for a total default judgment of $11,801,024.98; furthermore, "by virtue of Defendant's default in this matter, the Court declares that Defendant is obligated to pay any amounts billed by Plaintiff in the future arising out of the facultative certificates listed in Exhibit B to the Court's Order and Opinion dated May 10, 1999, it is further,

ORDERED: That this case is closed and the Clerk is directed to remove this case from the Court's docket.

DATED: New York, NY
May 17, 1999

JAMES M PARKISON
Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 18, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INS. CO.,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

ORDER

JOHN F. KEENAN, United States District Judge:

Defendant Seguros La Republica, S.A. ("Seguros") has filed Rule 72 objections to Magistrate Judge Bernikow's May 4, 1993 Report and Recommendation that Plaintiff's motion to strike La Seguros's answer and for entry of a default judgment be granted.

Briefly, the procedural history of this case is as follows: Seguros, a foreign insurer, filed a motion to dismiss for lack of personal jurisdiction. This Court denied the motion after finding that Plaintiff had made a prima facie showing of

jurisdiction over Seguros. *See* Opinion and Order, 90 Civ. 2370 (JFK), dated April 8, 1991. After Seguros had filed its answer, Plaintiff moved for pre-answer security. On June 16, 1992, this Court adopted Magistrate Judge Bernikow's report and recommendation and directed Seguros to post security of $5.7 million to secure payment of any judgment that may be entered in this case or in an action pending before Judge Lowe, *American Centennial Insurance Co. v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

In July 1992, Seguros's counsel advised Magistrate Judge Bernikow that Seguros would not be posting the security. In December 1992, Plaintiff filed a motion to strike Seguros's answer and to enter default judgment. Magistrate Judge Bernikow issued a Report and Recommendation on May 4, 1993, recommending that the answer be stricken and default be entered after a hearing on damages. Seguros now objects to the Report on the following grounds: (1) Magistrate Bernikow should have granted it discovery; (2) section 1213 does not apply to reinsurance transactions; (3) application of section 1213 in this action is unconstitutional.

As to the first objection, the Court finds that Magistrate Judge Bernikow's ruling on discovery was neither clearly erroneous nor contrary to law. He found that the discovery Seguros seeks is "irrelevant" in essence because by defaulting, Seguros "conceded . . . all well-pleaded allegations of liability" and "has effectively conceded the propriety of the payments it would question." Report at 7. Accordingly, Magistrate Judge Bernikow's discovery ruling is affirmed.

Appendix D

As to the second objection, this Court has already held that section 1213 applies to the case at bar. *See American Centennial Insurance Co. v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK), dated June 16, 1992. As Magistrate Judge Bernikow noted, this is the law of the case, and the objection is therefore overruled.

Seguros's third objection is that entering a default and awarding damages before an evidentiary hearing has been held on Seguros's personal-jurisdiction defense would deprive Seguros of due process. The Court notes that any judgment rendered by a court lacking either personal or subject matter jurisdiction is void from its inception. Accordingly, while the Court has already held that Plaintiff has made a prima facie showing of jurisdiction, Plaintiff must still prove by a preponderance of the evidence that there is personal jurisdiction over Defendant, whether in this court or in the court in which it will ultimately seek enforcement of the judgment. Efficiency dictates that the issue be resolved now, rather than on a collateral attack.

For this reason, the Court refers this matter to Magistrate Bernikow for an evidentiary hearing on the issue of personal jurisdiction. If personal jurisdiction is found, the hearing on damages may be held immediately, within the parameters set forth in the Report and Recommendation.

For the foregoing reasons, the Report and Recommendation is adopted with a direction that a hearing on personal jurisdiction be held before the hearing on damages.

Appendix D

SO ORDERED.

Dated: New York, New York
August 18, 1993

s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 16, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

MEMORANDUM OPINION AND ORDER

JOHN F. KEENAN, United States District Judge

Before the Court are the objections of Defendant, Seguros La Republica, S.A. ("Seguros"), to Magistrate Judge Bernikow's Report and Recommendation dated March 23, 1992.[1] *See* Fed. R. Civ. P. 72(a). Plaintiff, American

1. This Court had referred the pretrial proceedings in this case to Judge Bernikow. Accordingly, Plaintiff's motion was before Judge Bernikow for hearing and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). This opinion relates only to the action before this Court, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK) and not to the action before Judge Mary Johnson Lowe, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

Centennial Insurance Company ("ACIC"), moved to compel Seguros to deposit or file pre-answer security pursuant to New York Insurance Law § 1213(c)(1)(A). Plaintiff also moved to strike Seguros' answer in the event that Plaintiff's § 1213 motion was granted and Defendant failed to post security. Judge Bernikow recommended that ACIC's motion be granted in part and denied in part.

Defendant Seguros now raises two objections to Judge Bernikow's Report and Recommendation. First, Seguros contends that § 1213 of the New York Insurance Law does not apply to reinsurance disputes or transactions. Judge Bernikow addressed precisely this issue and found that although the business of reinsurance is to be distinguished from the business of insurance for some purposes, the New York State legislature did not intend to exempt unauthorized reinsurers from the § 1213(c)(1)(A) security requirement. *See American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK), Report and Recommendation (Magistrate Judge Bernikow), Mar. 23, 1992, at 4-5; *Morgan v. American Risk Management, Inc.*, No. 89 Civ. 2999 (JSM) (KAR), 1990 WL 106837 at *3, 6 (S.D.N.Y. July 20, 1990). This Court is persuaded by Judge Bernikow's reasoning and therefore finds Seguros' first objection to be without merit.

Second, Seguros asserts that an order requiring the defendant to post pre-answer security at this stage of the proceeding would constitute a taking without due process. *See* Defendant's Objection To Magistrate Judge's Report And Recommendation That Defendant Be Directed to Post Pre-Answer Security ("Def. Mem."), at 2-3. In support of

this contention, Seguros relies on *Connecticut v. Doehr*, 111 S. Ct. 2105 (1990), in which the Supreme Court clarified the constitutional analysis to be applied to prejudgment attachment statutes. As Judge Bernikow noted in his Report, *Doehr* is readily distinguishable from the instant case. *See* Report and Recommendation at 9-10. Accordingly, this Court rejects Seguros' second objection.

After careful review of Magistrate Judge Bernikow's Report, this Court finds no portion of the Report and Recommendation to be clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a). This Court therefore adopts the Report and Recommendation in its entirety. ACIC's motion to direct Seguros to post security is granted. ACIC's motion to strike the answer upon Seguros' failure to post security is denied as premature and without prejudice.

This Court also adopts Judge Bernikow's Supplemental Report and Recommendation dated April 13, 1992. Seguros is directed to deposit with the Clerk of the Court cash or securities or a surety bond in the amount of Five Million Seven Hundred Thousand Dollars ($5,700,000) to secure payment of any final judgment that may be rendered in this action or in the action pending before Judge Mary Johnson Lowe, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

Appendix E

SO ORDERED.

Dated: New York, New York
June 16, 1992

s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 13, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK) (LB)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,
a foreign corporation,

Defendant.

---

91 Civ. 1235 (MJL) (LB)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Petitioner,

– against –

SEGUROS LA REPUBLICA, S.A.,
a foreign corporation,

Respondent.

Appendix F

REPORT AND RECOMMENDATION

Plaintiff/Petitioner American Centennial Insurance Company ("ACIC"), having moved for an Order compelling Defendant/Respondent Seguros La Republica, S.A. ("Seguros") to deposit or file with the Clerk of the Court security pursuant to New York Insurance Law Section 1213(c)(1)(A), and the Court having previously recommended, in a Report and Recommendation dated March 23, 1992, that "ACIC's motion be granted to the extent of directing Seguros to post security," and the Court having heard the arguments of counsel regarding the proper amount of security, and after due deliberation, I recommend that Seguros be directed to deposit with the Clerk of this Court cash or securities, or file with the Clerk of this Court a bond with good and sufficient sureties, in the amount of Five Million Seven Hundred Thousand ($5,700,000.00) Dollars to secure payment of any final judgment which may be rendered in the captioned proceedings.

Dated: April 13, 1992

s/ Leonard Bernikow
Leonard Bernikow,
Magistrate Judge

APPENDIX G — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

---

91 Civ. 1235 (MJL)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Petitioner,

– against –

SEGUROS LA REPUBLICA, S.A.,

Respondent.

Appendix G

REPORT AND RECOMMENDATION

TO THE HONORABLE JOHN F. KEENAN, U.S.D.J.:
TO THE HONORABLE MARY JOHNSON LOWE, U.S.D.J.:

Plaintiff American Centennial Insurance Company ("ACIC") moves in both actions to compel defendant Seguros La Republica, S.A. ("Seguros") to deposit or file pre-answer security pursuant to New York Insurance Law § 1213(c)(1)(A) and to strike Seguros's answers in the event it does not comply with that statute. The motions were referred to me to hear and report. *See* 28 U.S.C. § 636(b)(1)(B).

Background

a. The Keenan action

The facts of this case are set forth in Judge Keenan's Opinion and Order, dated April 8, 1991, which denied Seguros's motion to dismiss the complaint for lack of personal jurisdiction. In brief, plaintiff in this diversity action seeks to recover more than $6,400,000 allegedly due under several certificates of facultative reinsurance issued by Seguros to reimburse ACIC for its share of losses and expenses incurred by ACIC pursuant to underlying insurance policies.[1] Seguros

1. The complaint demands judgment in the sum of $3,475,647.27, the amount of paid recoverables due ACIC at the time it commenced this action. The complaint also seeks judgment declaring that Seguros is obligated to pay amounts that come due (Cont'd)

is a foreign corporation existing under the laws of Mexico and in the business of insurance and reinsurance. ACIC is a Delaware corporation licensed to do business in New York.

b. The Lowe action

This report also concerns a diversity action before Judge Lowe in which plaintiff seeks to confirm a Final Arbitration Award rendered in an arbitration between ACIC and Seguros. ACIC contends that the award was issued after Seguros failed and refused to pay amounts due to ACIC under a Quota Share Retrocession Agreement for Excess Facultative Reinsurance Business. Under the terms of the arbitration award, as of March 31, 1991, Seguros owes $1,031,411.35 to ACIC.

Discussion

a. Insurance vs. reinsurance

ACIC contends that Seguros has failed to comply with N.Y. Insurance Law § 1213(c)(1)(A).[2] Section 1213(c)(1)(a)

(Cont'd)
under the facultative certificates in the future when and as billed. As of March 31, 1991, ACIC contends, Seguros's share of paid recoverables was $6,414,181.25. And that amount is subject to revision as ACIC pays additional claims.

2. Section 1213(c)(1) (McKinney 1985) provides:

> (c)(1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (Cont'd)

requires a foreign or alien insurer before filing any pleading in a proceeding against it to file a bond with the court. The purpose of the security deposit "is to ensure that the defendant insurer, if it 'defends and is unsuccessful, . . . will be able to satisfy the judgment.' " *T.P.K. Construction Corp. v. Southern American Ins. Co.*, 739 F. Supp. 213, 216 (S.D.N.Y. 1990) (quoting *Arnold Chait, Ltd. v. La Metropolitana, Compania Nacional de Seguros, S.A.*, 26 Misc. 2d 751, 207 N.Y.S. 22, 24 (N.Y. Sup. Ct. 1960); *see also Morgan v. American Risk Management, Inc.*, No. 89 Civ. 2999 (JSM) (KAR) 1190 WL 106837 *5 (S.D.N.Y. July 20, 1990). Seguros argues that § 1213(c)(1) does not apply to either of the two cases because the Keenan action involves a reinsurance contract and the Lowe action involves a proceeding to confirm an arbitration award.

(Cont'd)

> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in this state.

Seguros argues that § 1213 applies to insurance policies — not to reinsurance policies.[3] Reinsurance contracts, says Seguros, are merely contracts of indemnity, not policies of insurance. The same argument was made and rejected in *American* insurance. The same argument was made and rejected in *American Risk Management*, 1990 WL 106837 at *3.[4] The court there stated, "[w]hile a reinsurance treaty is arguably not a 'policy of insurance' or even a 'contract of insurance,' the contention that the legislature therefore did not intend § 1213 to apply to reinsurance must be rejected in light of the express language of [Insurance Law]

---

3. Seguros points out that cases have recognized that reinsurance agreements are distinct from contracts insuring against liability. *E.g.*, *Liberty Mutual Ins. Co. v. Gibbs*, 773 F.2d 15, 18 (1st Cir. 1985); *Security Mutual Casualty Co. v. Century Casualty Co.*, 531 F.2d 974, 977 (10th Cir.), *cert. denied*, 429 U.S. 860 (1975). This distinction appears to focus on the fact that the reinsurer's liability is conditioned upon the insurer's prior payment of loss. *American Risk Management*, 1990 WL 106837 at *6 n. 8 (citing *Skandia American Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 724 (S.D.N.Y. 1977)). Thus, "the insured is not considered a third-party beneficiary of the reinsurance treaty, and cannot recover against the reinsurer, even if the insurer becomes insolvent." *Id.* But the cases cited by Seguros have nothing to do with a foreign insurer's duty to file pre-answer security, as required by state law. *See id.* at *6.

4. This argument was also tacitly rejected in *Curiale v. Ardra Insurance Co.*, No. 9794/85 (Sup. N.Y. Co. May 2, 1991), Exh. F to Cohen Aff. There, the defendant argued that § 1213 did not apply to reinsurers because the statute is a sort of consumer protection statute. Although the court did not discuss the issue, it issued an order granting the plaintiff's motion to strike the answer unless the defendant posted security.

§ 1101(b)(2)(G)." *Id.* 1990 WL 106837 at *6 (footnote omitted). Section 1101(b)(2)(G) (McKinney 1985) provides:

> (2) Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:
>
> * * *
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

"Thus, although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, it appears that it did not intend that the unauthorized reinsurers be exempted from New York's long-arm statute and security requirement." *American Risk Management*, 1990 WL 106837 at *6.

Nonetheless, Seguros argues that § 1101 merely addresses the issue of what constitutes "doing an insurance business" in New York and, therefore, is relevant only to the "doing business" provisions of subsection (b) of § 1213 regarding service of process. Section 1101 is not applicable, Seguros continues, to the pre-answer security provisions of

subsection (c) of § 1213, which does not refer to or define the concept of doing business. Seguros cites no authority for its argument. The court in *American Risk Management* did not distinguish between subsection (b) and (c) of § 1213 in relying on § 1101. As noted, the court there expressly stated that the legislature apparently did not intend to exempt reinsurers from the long arm statute or the security requirement of § 1213. Additionally, as ACIC argues, it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to the security requirements.

Seguros also argues that even if § 1213 applies to reinsurance transactions, it does not apply to the transactions at issue because § 1101(b)(2) applies only to reinsurance transactions "effected by mail from outside [New York]." ACIC alleges in paragraph 2 of the complaint that the reinsurance transactions between ACIC and CJV were effected in person from inside of New York by CJV. Section 1101(b)(2) does not appear to mean that § 1213 applies only to acts and transactions effected by mail from outside of New York. Rather, as ACIC argues, the section means that even where the acts of the alien insurer falls short of the "doing an insurance business" standard, such as by effecting a transaction by mail outside of the state, § 1213 shall nevertheless be applicable. Moreover, as ACIC again argues, reading the statute in the way Seguros urges leads to an absurd result: alien insurers transacting business in New York through the mails would be subject to the security requirement, yet such insurers transacting business through an agent would not. Finally, in *American Risk Management*, 1990 WL 106837 at *7, and *Aero Associates v.*

La Metropolitana, 183 F. Supp. 357, 359 (S.D.N.Y. 1960), involving agreements executed and delivered in New York and alien insurers, the court found the statute or its predecessor applicable.[5] In short, applying the holding of *American Risk Management* to the instant case, I find that § 1213 applies to reinsurers.

b. Arbitration

Seguros argues that section 2312 does not apply to the Lowe action because that action involves a petition to confirm an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The Lowe action is not, Seguros adds, a suit by or on behalf of an insured under an insurance contract or a reinsurance contract within the meaning of Section 1213.[6] The arbitration, however, arose out of a reinsurance contract. The petition to confirm results from ACIC's efforts to enforce that contract. This reading of § 1213 does not undermine the purpose of the statute. But more than that, Section 1213(c)(1)(A) requires the posting of security before an "alien insurer files any pleading in a proceeding against it." This action is a proceeding against an alien insurer. Thus, by its terms, § 1213 applies to the Lowe action.

---

5. *La Metropolitana* did not involve the security requirement. It dealt with the predecessor statute's provision designating the superintendent of insurance as the alien insurer's attorney upon whom process may be served.

6. I assume Seguros refers to the first sentence of § 1213(a) for its contention.

c. Due Process

Seguros next argues that § 1213, as applied to this case, deprives it of due process because the statute requires it to post security before its jurisdictional defense is adjudicated. Seguros argues that if it has to post pre-answer security before being permitted to avail itself of the judicial process, it will suffer both temporary and permanent deprivation of property. In addition, Seguros says, there are genuine fact issues concerning whether there is a contractual basis to support ACIC's claims.

In his opinion denying Seguros's motion to dismiss for lack of personal jurisdiction, Judge Keenan found that ACIC made a *prima facie* showing of jurisdiction, slip op. at 14, all that was necessary at the pre-discovery stage. *Ball v. Metallugie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.), *cert. denied*, 111 S.Ct. 150 (1990). Furthermore, Judge Keenan stated that his finding did not violate the constitutional standards for assertion of jurisdiction over a foreign defendant. Slip op. at 15.

Moreover, § 1213's predecessor has been found constitutional when faced with due process and equal protection challenges. *Ace Grain Co. v. Amerian Eagle Fire Ins. Co.*, 95 F.Supp. 784, 787 (S.D.N.Y. 1951). In addition, California's equivalent to § 1213 has also been found constitutional. *Triherdron Int'l Assurance, Ltd. v. Superior Court*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (4th Dist. 1990). In California, the court found the statute "a proper

exercise of the state's police power to regulate the transaction of insurance."[7] *Id.* 218 Cal. App.3d at 939.

Nevertheless, Seguros cites cases concerning traditional prejudgment creditors' remedies: *e.g.*, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Connecticut v. Doehr*, 111 S. Ct. 2105 (1990). These cases are readily distinguishable from the instant cases. *Trihedron*, 218 Cal. App.3d at 947. "In the creditor's remedies cases the state has no substantial interest to protect in providing plaintiffs with a prejudgment financial advantage over defendants." *Id.* The state in the instant case has an interest in protecting its insureds and beneficiaries. *See Id.* Thus, the due process claim should be rejected.

d. Documentation

Seguros also contends that ACIC's claim for reimbursement is not substantiated by sufficient

---

7. The California statute, Insurance Code § 1616, provides in pertinent part:

> Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action . . . instituted against it, the insurer shall either (1) procure a certificate of authority to transact insurance in this state; or (2) give a bond in the action . . . in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action, . . .

Trihedron, 218 Cal. App.3d at 940 n.2.

documentation. For example, Seguros notes that ACIC does not have the originals or copies of thirteen underlying insurance policies for claims relating to thirteen facultative certificates for which plaintiff seeks $556,014.44. Nonetheless, the merits of the case have no bearing on the posting of security. *American Risk Management*, 1990 WL 106837 at *8.[8] If Seguros's position were accepted, a plaintiff would have to prove its case before a defendant answered.

e. Mexican Law

Seguros has also submitted the affidavit of its Director of Administration, which states that in order to procure a bond in the amount requested, Seguros would have to pledge its assets in the amount of the value of the bond.[9] According to Mexican law, the affidavit says, an insurance institution such an Seguros is prohibited from pledging its properties and, hence, even if ordered to post a bond, Seguros could not comply. Seguros also notes, in the affidavit, that at present insurance authorities in Mexico prohibit the transfer of any funds outside of Mexico.

In response, ACIC has submitted the affidavit of a practicing attorney in Mexico that disputes Seguros's affidavit. In that attorney's opinion there is no legal prohibition under Mexican law preventing Seguros from posting a bond in New York issued by a Mexican or

---

8. A merits argument was also unsuccessfully raised in *Trihedron*, 218 Cal. App.3d at 946 & n.9.

9. The affidavit does not indicate that the affiant is an attorney.

U.S. bonding company. In any event, the laws of Mexico concerning the posting of a bond have no relevance to the obligation of a foreign insurer under § 1213.

Conclusion

For the reasons stated, I recommend that ACIC's motion be granted to the extent of directing Seguros to post security. As noted, ACIC also requests that upon Seguros's failure to do so that the answer be stricken. That kind of relief at this time is premature and, accordingly, I recommend that this part of the motion be denied without prejudice. As for the amount of the bond, the parties should attempt to agree. If they cannot, they should schedule a conference before me.

Copies of this report have been mailed this date to the parties listed below, who are hereby advised of their right to file objections to this report with Judge Lowe and Judge Keenan on or before April 9, 1992. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e). Failure to object to this report by that date will preclude appellate review. *Small v. Secretary*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated: New York, New York
March 23, 1992

Respectfully submitted,

s/ Leonard Bernikow
LEONARD BERNIKOW
United States Magistrate Judge

APPENDIX H — RELEVANT STATUTES

New York Insurance Law § 1101(b)(2), (b)(2)(G)

§ 1101. Definitions; doing an insurance business

* * *

(b)(2) Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:

* * *

> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter;

* * *

New York Insurance Law § 1102(a)

§ 1102. Insurer's license required; issuance

(a) No person, firm, association, corporation or joint-stock company shall do an insurance business in this state unless authorized by a license in force pursuant to the provisions of this chapter, or exempted by the provisions of this chapter from such requirement. Any person, firm,

association, corporation or joint-stock company which transacts any insurance business in this state while not authorized to do so by a license issued and in force pursuant to this chapter, or exempted by this chapter from the requirement of having such license, shall, in addition to any other penalty provided by law, forfeit to the people of this state the sum of one thousand dollars for the first violation and two thousand five hundred dollars for each subsequent violation.

* * *

New York Insurance Law § 1213

§ 1213. Service of process on superintendent as attorney for unauthorized insurers

(a) The purpose of this section is to subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this section, what constitutes doing business in this state, and also exercises

powers and privileges available to the state by virtue of public law number fifteen, seventy-ninth congress of the United States, chapter twenty, first session, senate number three hundred forty, as amended, (15 U.S.C. § 1011) which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

(b)(1) Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer:

> (A) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein,
>
> (B) the solicitation of applications for such contracts,
>
> (C) the collection of premiums, membership fees, assessments or other considerations for such contracts, or
>
> (D) any other transaction of business,

is equivalent to and constitutes its appointment of the superintendent, and his successors in office, to be its true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of

insurance, and shall signify its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

(2) Such service of process upon any such insurer in any such proceeding in any court of competent jurisdiction of this state may be made by serving the superintendent, any deputy superintendent or any salaried employee of the department whom the superintendent designates for such purpose with two copies thereof and the payment to him of a fee of twenty dollars. The superintendent shall forward a copy of such process by registered or certified mail to the defendant at its last known principal place of business, as designated by the issuer of such process, and shall keep a record of all process so served upon him. Such service of process under this paragraph is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by or on behalf of the plaintiff to the defendant at its last known principal place of business by registered or certified mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court if there be no clerk, an affidavit of compliance herewith, a copy of the process, and either a return receipt purporting to be signed by the defendant or a person qualified to receive its registered or certified mail in accordance with the rules and customs of the post

office department, or, if acceptance was refused by the defendant or its agent, the original envelope bearing a notation by the postal authorities that receipt was refused. Service of process so made shall be deemed made within the territorial jurisdiction of any court in this state.

(3) Service of process in any such proceeding shall in addition to the manner provided in paragraph two of this subsection be valid if served upon any person within this state who, in this state on behalf of such insurer, is:

(A) soliciting insurance;

(B) making, issuing or delivering any contract of insurance; or

(C) collecting or receiving any premium, membership fee, assessment or other consideration for insurance;

provided notice of such service and a copy of such process are sent within ten days thereafter, by or on behalf of the plaintiff to the defendant at the last known principal place of business of the defendant, by registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either a return receipt

purporting to be signed by the defendant or a person qualified to receive its registered mail in accordance with the rules and customs of the post office department; or, if acceptance was refused by the defendant or its agent the original envelope bearing a notation by the postal authorities that receipt was refused.

(4) The papers referred to in paragraphs two and three of this subsection shall be filed within thirty days after the return receipt or other official proof of delivery, or the original envelope bearing a notation of refusal, is received by the plaintiff. Service of process shall be complete when such process and the accompanying papers are filed pursuant to this section.

(5) Nothing contained in this section shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner permitted by law.

(c)(1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:

(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of

any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or

(B) procure a license to do an insurance business in this state.

(2) The court in any proceeding wherein service is made pursuant to paragraph two or three of subsection (b) of this section may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of paragraph one of this subsection and to defend such proceeding.

(3) Nothing in paragraph one of this subsection is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to set aside service made in the manner provided in paragraph two or three of subsection (b) hereof on the ground (i) that such unauthorized insurer has not done any act enumerated in paragraph one of subsection (b) of this section, or (ii) that the person on whom service was made

pursuant to paragraph three of subsection (b) hereof was not doing any act therein enumerated.

(d) In any action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty days after demand prior to the commencement of the action to make payment pursuant to the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow plaintiff a reasonable attorney's fee and include such fee in any judgment rendered in such action. Such fee shall not exceed twelve and one-half percent of the amount the court finds the plaintiff is entitled to recover against the insurer nor be less than twenty-five dollars. Failure of an insurer to defend any such action shall be prima facie evidence that its failure to pay was vexatious and without reasonable cause.

(e) This section shall not apply to any proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effectuated in accordance with subsection (b) or (c) of section two thousand one hundred seventeen of this chapter or in accordance with section two thousand one hundred five of this chapter where such contract designates the superintendent or his successors in office the insurer's true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of such contract.

(f) The superintendent shall keep a record of each process served upon him under this section and pursuant to

section one thousand two hundred twelve of this article, including the date of service. He shall, upon request made within ten years of such service, issue a certificate under his seal certifying as to the receipt of the process by an authorized person, the date and place of service and the receipt of the statutory fee. Process served upon the superintendent pursuant to this section or section one thousand two hundred twelve of this article shall be destroyed by him after a period of ten years from such service.

* * *

New York Insurance Law § 1301(a), (a)(14)

§ 1301. Admitted assets

(a) In determining the financial condition of a domestic or foreign insurer or the United States branch of an alien insurer for the purposes of this chapter, there may be allowed as admitted assets of such insurer, unless otherwise specifically provided in this chapter, only the following assets owned by such insurer:

* * *

(14) Reinsurance recoverable by a ceding insurer: (i) from an insurer authorized to transact such business in this state, except from a captive insurance company licensed pursuant to the provisions of article seventy of this chapter, in the full amount thereof; (ii) from an accredited reinsurer, as defined in subsection (a) of section

one hundred seven of this chapter, to the extent allowed by the superintendent on the basis of the insurer's compliance with the conditions of any applicable regulation; or (iii) from an insurer not so authorized or accredited or from a captive insurance company licensed pursuant to the provisions of article seventy of this chapter, in an amount not exceeding the liabilities carried by the ceding insurer for amounts withheld under a reinsurance treaty with such unauthorized insurer or captive insurance company licensed pursuant to the provisions of article seventy of this chapter as security for the payment of obligations thereunder if such funds are held subject to withdrawal by, and under the control of, the ceding insurer. Notwithstanding any other provision of this chapter, the superintendent may by regulation prescribe the conditions under which a ceding insurer may be allowed credit, as an asset or as a deduction from loss and unearned premium reserves, for reinsurance recoverable from an accredited reinsurer , an insurer not authorized in this state or a captive insurance company licensed pursuant to the provisions of article seventy of this chapter.

* * *

Appendix H

New York Insurance Law § 4104

§ 4104. Deposits

(a) Before being licensed to write one or more of the kinds of insurance defined respectively in the following paragraphs of subsection (a) of section one thousand one hundred thirteen of this chapter: burglary and theft (7), glass (8), boiler and machinery (9), elevator (10), animal (11), personal injury liability (13), property damage liability (14), workers' compensation and employers' liability (15), fidelity and surety (16), or credit (17), a domestic property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least five hundred thousand dollars or the amount required as paid-in capital or minimum surplus for the kind or kinds of insurance which such company is to be licensed to write, whichever is the lesser, but in no event shall the amount of the deposit be less than four hundred thousand dollars for any stock company writing any two kinds of insurance designated in this subsection.

(b) Before being licensed pursuant to subsection (c) of section four thousand one hundred two of this article to reinsure risks or to write insurance on risks outside of the United States, its territories and possessions, a domestic property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least three million dollars. Such deposit shall be inclusive of any deposit required by subsection (a) or (c) hereof.

(c) Before being authorized to issue non-assessable policies pursuant to section four thousand one hundred thirteen of this article, a domestic mutual property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least five hundred thousand dollars. Such deposit shall be inclusive of any deposit required by subsection (a) or (b) hereof.

(d) Before being granted any license or renewal license, every foreign property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount not less than the amount required for a similar domestic property/casualty insurance company. The superintendent shall accept in lieu of such deposit a certificate of the proper state officer of the state under whose laws such company is organized showing that such company has deposited with the proper officer of such state, in trust for the benefit and protection of, or for the security of, all of its policyholders, or of all of its policyholders and creditors, securities valued at an amount not less than the amount hereinbefore specified. Such certificate and deposit shall be governed by the provisions of sections one thousand three hundred eighteen and one thousand three hundred nineteen of this chapter.

(e) The dollar amounts of the deposits specified in subsections (a) and (c) hereof shall be reduced by fifty percent for any property/casualty insurance company initially licensed to do business in this state prior to July first, nineteen hundred eighty-two.

* * * *